Supreme Court, U.S.
FILED
APR 23 2003
OFFICE OF THE CLERK

(2)

No. 02-1421

In The
Supreme Court of the United States

HARVEY AND DORIS MADISON, CHARLES AND ELENA D'AUTREMONT, and HARRISON SAUNDERS,

Petitioners,

v.

PATRICK J. GRAHAM, Director, Montana Department of Fish, Wildlife & Parks; STAN MEYER, DAVID SIMPSON, CHARLES DECKER, DARLYNE DASCHER, and TIM MULLIGAN, Commissioners, Montana Fish, Wildlife and Parks Commission; MONTANA COALITION FOR STREAM ACCESS; MONTANA WILDLIFE FEDERATION; MONTANA CHAPTER OF TROUT UNLIMITED; and FISHING OUTFITTERS ASSOCIATION OF MONTANA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENTS, MONTANA COALITION FOR STREAM ACCESS; MONTANA WILDLIFE FEDERATION; MONTANA CHAPTER OF TROUT UNLIMITED; AND FISHING OUTFITTERS ASSOCIATION OF MONTANA, IN OPPOSITION

JAMES H. GOETZ
Counsel of Record
GOETZ, GALLIK, BALDWIN & DOLAN, PC
35 North Grand
P.O. Box 6580
Bozeman, Montana 59771-6580
(406) 587-0618
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

23 pp

QUESTION PRESENTED

Whether the Landowners may pursue their claim based on a Fourteenth Amendment substantive due process theory where explicit textual protection is available under the Takings and Just Compensation Clauses of the Fifth Amendment.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	1
ARGUMENT	6
1. THE NINTH CIRCUIT PROPERLY DECLINED TO APPLY SUBSTANTIVE DUE PROCESS ANALYSIS BECAUSE THE TAKINGS CLAUSE PROVIDES AN EXPLICIT TEXTUAL SOURCE OF CONSTITUTIONAL PROTECTION	6
2. THE DECISION OF THE NINTH CIRCUIT IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT	9
3. ALTHOUGH SEVERAL CIRCUITS HAVE APPROACHED THE TAKINGS/SUBSTANTIVE DUE PROCESS ISSUE SOMEWHAT DIFFERENTLY FROM THE NINTH CIRCUIT, THERE IS NO DIRECT CONFLICT	12
CONCLUSION	17

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Agins v. City of Tiburon, 447 U.S. 255 (1980) 9

Albright v. Oliver, 510 U.S. 266 (1994) 8

Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) ..... *passim*

Collins v. Harker Heights, 503 U.S. 115 (1992) 8, 10, 11

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 10

Daniels v. Williams, 474 U.S. 327 (1986) 10

Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358 (Fed. Cir. 1998) 16

Dolan v. City of Tigard, 512 U.S. 374 (1994) 6, 17

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 9, 10

Esplanade Properties, LLC v. City of Seattle, 307 F.3d 978 (9th Cir. 2002) 7

Graham v. Connor, 490 U.S. 386 (1989) ..... *passim*

Iowa Coal Min. Co. v. Monroe County, Iowa, 257 F.3d 846 (8th Cir. 2001) 16

John Corp. v. City of Houston, 214 F.3d 573 (5th Cir. 2000) 9, 14, 15

Kaluczky v. City of White Plains, 57 F.3d 202 (2nd Cir. 1995) 16

Loretto v. Teleprompter, Manhattan CATV Corp., 458 U.S. 419 (1982) 7

Macri v. King County, 126 F.3d 1125 (9th Cir. 1997) 5, 6, 7, 15

Madison v. Graham, 316 F.3d 867 (9th Cir. 2002) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Madison v. Graham, 126 F.Supp.2d 1320 (D. Mont. 2001) 1

Miller v. Campbell County, 945 F.2d 348 (10th Cir. 1991) 12

Montgomery v. Carter County, Tenn., 226 F.3d 758 (6th Cir. 2000) 14

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 6

Pearson v. City of Grand Blanc, 961 F.2d 1211 (6th Cir. 1992) 13, 14

Sameric Corp. v. City of Philadelphia, 142 F.3d 582 (3rd Cir. 1998) 16

Simi Inv. Co., Inc. v. Harris County, Texas, 236 F.3d 240 (5th Cir. 2000) 14

Sinclair Oil v. County of Santa Barbara, 96 F.3d 401 (9th Cir. 1996) 5

Soldal v. Cook County, Illinois, 506 U.S. 56 (1992) 11, 12

South County Sand & Gravel Co., Inc. v. Town of South Kingstown, 160 F.3d 834 (1st Cir. 1998) 12, 13, 15

Villas of Lake Jackson v. Leon County, 121 F.3d 610 (11th Cir. 1997) 9, 13, 16, 17

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 9

STATE CASES

Adjudication of the Existing Rights to the Use of All the Water, 2002 MT 216, 311 Mont. 327, 55 P.3d 396 2

TABLE OF AUTHORITIES – Continued

Page

Galt v. State Dept. of Fish, Wildlife & Parks (Galt I), 225 Mont. 142, 731 P.2d 912 (1987) 2, 3, 4, 5

Galt, et al. v. State Dept. of Fish, Wildlife & Parks (Galt II), 230 Mont. 327, 749 P.2d 1049 (1988) 4

Gibson v. Kelly, 15 Mont. 417, 39 P. 517 (1895) 1

Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984) 1, 2, 5

Montana Coalition for Stream Access v. Hildreth, 211 Mont. 29, 684 P.2d 1088 (1984) 1

CONSTITUTIONAL PROVISIONS

U.S. Constitution, First Amentment 16

U.S. Constitution, Fourth Amendment 8, 11, 12, 15, 17

U.S. Constitution, Fifth Amendment 4, 5, 6, 7, 14

U.S. Constitution, Fourteenth Amendment 4, 5, 6, 16

Montana Constitution, Art. II, § 29 4

Montana Constitution, Art. IX, § 3(3) 1, 5

FEDERAL STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 10, 11

STATE STATUTES

Mont. Code Ann. § 23-2-301, et seq. 2, 5

OPINIONS BELOW

The Opinion of the Court of Appeals (Pet. App. 1-11) is reported at 316 F.3d 867 (9th Cir. 2002). The Opinion and Order of the United States District Court for the District of Montana (Pet. App. 12-27) is reported at 126 F.Supp.2d 1320 (D. Mont. 2001).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Since before Montana's statehood in 1889, the lands of Montana's riparian landowners have been impressed with a public servitude allowing navigational and recreational use by the public. In *Gibson v. Kelly*, 15 Mont. 417, 423, 39 P. 517 (1895). The Court said:

> It is true that while the abutting owner owns to the low-water mark on navigable rivers, still the public have certain rights of navigation and fishery upon the rivers and upon the strip in question . . .

The issue of stream access in Montana was addressed in 1984 by the seminal companion cases, *Montana Coalition for Stream Access v. Curran*, 210 Mont. 38, 682 P.2d 163 (1984), and *Montana Coalition for Stream Access v. Hildreth*, 211 Mont. 29, 684 P.2d 1088 (1984). Relying on the public trust doctrine found in Article IX, § 3(3) of the Montana Constitution, the Court found that the state

owns the waters for the benefit of the people and held that the public's right to use the waters includes the right of use of the bed and banks up to the high-water mark. The holdings were broad. In *Curran*, the Court summarized its holding as follows:

> In sum, we hold that, under the public trust doctrine and the 1972 Montana Constitution, *any* surface waters that are capable of recreational use *may be so used by the public without regard to stream bed ownership or navigability* for non-recreational purposes.

210 Mont. at 53, 682 P.2d at 171 (emphasis added).[1]

In response to the *Coalition* decisions, the Montana Legislature passed HB 265 in 1985. HB 265 is now codified as § 23-2-301 *et seq.*, MCA.

The stream access legislation was the product of a compromise between recreationists and landowners. A judicial characterization of that process is found in Justice Hunt's dissenting opinion in *Galt v. State Dept. of Fish, Wildlife & Parks*, 225 Mont. 142, 731 P.2d 912 (1987) ("*Galt I*"), a constitutional challenge to HB 265 filed shortly after its enactment. Justice Hunt noted the goal of the subcommittee which generated HB 265 was to keep the legislation "... within the bounds of the Supreme

---

[1] This holding was followed in *Adjudication of the Existing Rights to the Use of All the Water*, 2002 MT 216, 311 Mont. 327, 55 P.3d 396, ¶27 (Recognizing that public recreational use and fishing may make a stream navigable for "use" as opposed to title, and rejecting the old, narrow test of navigability). *Adjudication of the Existing Rights* was decided September 24, 2002, after the District Court's decision in this case but prior to the Circuit Court's decision.

Court decisions and to express the Legislature's desire to tie down and define the areas that were left very broad in those decisions." 225 Mont. at 153.

That legislation had the support of all of Montana's mainstream agricultural groups. The written testimony of the lobbyist for the Montana Stockgrowers Association is quoted at length by Justice Hunt in *Galt I*. The lobbyist noted that the *Coalition* decisions were ". . . broad, sweeping decisions which allowed the public the right to use all state waters for any recreational and incidental uses." *Id.* The lobbyist stated that:

> All groups agreed that it was critical to pass legislation this session, both to define areas left unclear by the Supreme Court of Montana's decisions, to allay the fears of landowners and recreationalists, and to avoid conflict as the newly won rights were tested and applied to specific streams other than the streams subject to the litigation.

Id. The lobbyist noted that, "while the results reached in those [*Coalition*] decisions were not to the liking of most landowners, it is irresponsible to ignore those decisions or to propose legislation which is not cognizant of the opinions of the Court." *Id.* at 155.

Even though the Montana Stream Access Law was the product of a unique alliance, and even though all of the responsible Montana agricultural groups supported it, it was challenged on constitutional grounds by Galt and others, including Harrison Saunders, who is a Plaintiff in

the present action.[2] The *Galt* plaintiffs were successful in setting aside several minor aspects of the Stream Access Law, but, in the main, the Montana Supreme Court upheld the statute. *Galt I*.

After *Galt I*, the law, as it applied to stream access, remained settled in Montana until 2000.

The present lawsuit was filed May 31, 2000, by three sets of Landowners, claiming that their Fourteenth Amendment rights to substantive due process of law are violated. This action was filed sixteen years after the *Coalition* decisions, fifteen years after the Stream Access Law was enacted, and thirteen years after the *Galt* decisions.

The Landowners claim that when they acquired their property they paid taxes on the property beneath the non-navigable stream on their land. This is not true. County Tax Assessors in Montana do not allocate real property taxes based on whether or not streams exist on property. Landowners' Statement of Facts also contains bald statements such as the Landowners have been "robbed" of their privacy, that their lands have been subjected to "commercial

---

[2] The *Galt* plaintiffs based their complaint on state and federal constitutional issues. The *Galt* plaintiffs:

> [S]ought an order declaring HB 265, the "Stream Access Bill", § 23-2-301, *et seq.* MCA (1985), unconstitutional as a taking of private property without just compensation in violation of the *Fifth Amendment and Fourteenth Amendment to the United States Constitution* and Article II, § 29 of the Montana Constitution.

Galt, et al. v. State Dept. of Fish, Wildlife & Parks (*Galt II*), 230 Mont. 327, 328, 749 P.2d 1049 (1988) (emphasis added).

exploitation", and that the Stream Access Law has ". . . despoiled the pristine beauty of the land they love." Pet. for Cert., p. 4.

After hearing, the District Court dismissed the Landowners' Complaint with prejudice. The District Court first addressed the history of stream access in the state of Montana, addressing the 1972 Montana Constitution, which contains the following provision:

> All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Article IX, § 3(3), E.R., p. 022. The Court then discussed the two seminal Montana cases, *Montana Coalition for Stream Access v. Curran*, *supra*, (the *Dearborn River Case*) and *Montana Coalition for Stream Access v. Hildreth*, *supra* (the *Beaverhead River Case*). The Court also discussed the enactment in 1985, "after much political compromise," of the Montana Stream Access Law §§ 23-2-301, *et seq.*, MCA. The Court then discussed *Galt I*, finding that, while certain minor provisions of the Stream Access Bill were found to be unconstitutional, the balance of the statutory scheme accords with the Constitution. The District Court found it significant that the plaintiffs in *Galt I* failed to appeal.

The District Court determined that the Landowners' first claim is properly viewed as a Fifth Amendment takings claim rather than a Fourteenth Amendment substantive due process claim. *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (*en banc*); *Macri v. King County*, 126 F.3d 1125 (9th Cir. 1997); *Sinclair Oil v. County of*

Santa Barbara, 96 F.3d 401 (9th Cir. 1996). 126 F.Supp.2d at 1324 (App. 18). The Court held that, even if construed as a "takings claim", the Supreme Court precedents of *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) do not support their argument. *Id.* at 1324-38 (App. 18-20).

The Circuit Court affirmed the decision of the District Court based on the Ninth Circuit's decision in *Armendariz*, holding that Landowners' claims alleging governmental interference with property must be brought under the Takings Clause of the Fifth Amendment, rather than the Due Process Clause of the Fourteenth Amendment. 316 F.3d at 870, App. 9. The Circuit Court also affirmed the District Court's rejection of the Landowners' void for vagueness claim on the basis that it was not adequately pled and that, in any event, there was nothing vague about the statute. *Id.* at 871 (App. 9, 10).

ARGUMENT

1. THE NINTH CIRCUIT PROPERLY DECLINED TO APPLY SUBSTANTIVE DUE PROCESS ANALYSIS BECAUSE THE TAKINGS CLAUSE PROVIDES AN EXPLICIT TEXTUAL SOURCE OF CONSTITUTIONAL PROTECTION.

The Ninth Circuit determined in the Opinion below, after a close inspection of the Complaint, that the harms allegedly caused by the Montana Stream Access Law ". . . result from the Appellants' inability under the law to exclude others from their property." 316 F.3d at 869 (App. 5). In particular, the Ninth Circuit noted that the Plaintiff-Landowners' alleged right to exclude others from their

property represents ". . . one of the most essential sticks in the bundle of rights that are commonly characterized as property . . . ." citing *Loretto v. Teleprompter, Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982). The Circuit Court pointed out that Appellants recognize this well-established principle, citing the Complaint's language that, "[T]he power to exclude others is the hallmark of a private property interest, an essential component of private property rights." *Id.* (App. 6).

Thus, the Circuit Court found that the dispositive issue is whether the Landowners' claims must be analyzed under the Fifth Amendment's Takings Clause, ". . . or whether the analysis falls under the more generalized notions of substantive due process." *Id.*

The Ninth Circuit's opinion followed its previous opinion in *Armendariz* in holding that the Landowners' Complaint is governed by the more explicit constitutional provisions of the Takings Clause rather than the more generalized notion of substantive due process. *Armendariz*, in turn, was based on this Court's decision in *Graham v. Connor,* 490 U.S. 386 (1989).

The Ninth Circuit's decision is manifestly correct. First, it faithfully followed its precedents – not only *Armendariz*, but other Ninth Circuit precedents to the same effect. *See, e.g., Esplanade Properties, LLC v. City of Seattle,* 307 F.3d 978 (9th Cir. 2002) (affirming dismissal of federal substantive due process claim); *Macri v. King County,* 126 F.3d 1125, 1129 (9th Cir. 1997) (stating that Appellants cannot side-step *Armendariz* by re-characterizing their claim as lying solely in substantive due process).

These Ninth Circuit precedents, in turn, faithfully applied this Court's holding in *Graham v. Connor*, 490

U.S. 386, 395 (1989) ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.")

This Court, in *Albright v. Oliver,* 510 U.S. 266, 271 (1994), anchored the *Graham* principle in holding that an arrest without probable cause is more properly analyzed under the Fourth Amendment's "seizure" rubric and did not constitute a violation of the arrestee's substantive due process rights:

> We begin analysis of petitioner's claim by repeating our observation in *Collins v. Harker Heights,* 503 U.S. 115, 125 . . . (1992). "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decision-making in this unchartered area are scarce and open-ended." The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity. *See, e.g., Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 847-849 . . . (1992) (describing cases in which substantive due process rights have been recognized). Petitioners' claim to be free from prosecution except on the basis of probable cause is markedly different from those recognized in this group of cases.

In short, the Ninth Circuit's refusal to allow Landowners to side-step the Takings Clause was manifestly correct.

2. THE DECISION OF THE NINTH CIRCUIT IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

The Landowners incorrectly argue that this Court has maintained a clear distinction between a substantive due process claim and a takings claim. Pet. for Cert., p. 7. To the contrary, language inserting principles of due process into takings jurisprudence is quite common. *See, e.g., Eastern Enterprises v. Apfel,* 524 U.S. 498, 537 (1998) (plurality Opinion) (O'Connor, J.) (concluding that "the governmental action [at issue in the case] implicates fundamental principles of fairness underlying the Takings Clause"); *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980) (holding that zoning ordinance constitutes a taking if it does not "substantially advance a legitimate government interest").

Numerous Circuit Courts, in addition to the Ninth Circuit's decision in *Armendariz,* blur the distinction between takings and substantive due process, in the land-use context. *See, e.g., John Corp. v. City of Houston,* 214 F.3d 573, 584 (5th Cir. 2000), referring to the *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985) finality requirement in relation to the "'due process takings' claim described in that case"; *see also Villas of Lake Jackson v. Leon County,* 121 F.3d 610, 612 (11th Cir. 1997) (characterizing the main claim as a "due process takings" claim).

Landowners further argue that this Court's Opinion in *Apfel,* 524 U.S. 498, 537-38 (1998) (plurality Opinion) "preserved" a person's substantive due process claim regarding his property, even when he also asserted a takings claim. Pet. for Cert., p. 8. In fact, only Justice Kennedy's concurrence was based on substantive due process. The four

Justice plurality Opinion simply states that ". . . We need not address *Eastern's* due process claim . . . ." because they determined that the Act's allocation scheme violates the Takings Clause. 524 U.S. 538. Moreover, Justice Kennedy's concurrence finds the Takings Clause inapt because the Coal Act there challenged ". . . does not operate upon or alter an identified property interest, and is not applicable to or measured by a property interest." *Id.* at 540. Instead it ". . . imposes a staggering financial burden on the petitioner, Eastern Enterprises, but it regulates the former mine owner without regard to property." *Id.* Unlike *Apfel,* the present case involves a claim that the challenged Montana statute deprives the Landowners of a property right – a classic "takings" claim.

Landowners' reliance on *Collins v. City of Harker Heights,* 503 U.S. 115 and *County of Sacramento v. Lewis,* 523 U.S. 833, 845 (1998), Pet. for Cert., p. 8, is misplaced. Neither case involved land-use issues or classic regulatory takings issues. *Harker Heights* simply rejected a claim under 42 U.S.C. § 1983 that a city's failure to train or warn its employees about known hazards in the work place did not violate the Due Process Clause and that the Due Process Clause ". . . does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." Citing *Daniels v. Williams,* 474 U.S. 327, 332 (1986); 503 U.S. 115. Likewise, in *County of Sacramento,* the Court rejected a § 1983 claim against County Deputies, finding that an allegation of deliberate indifference to life in pursuing a high speed chase of a suspect was insufficient to state a substantive due process claim.

In *Harker Heights,* the Court observed:

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.

503 U.S. 125. The Court continued that the doctrine of judicial self-restraint requires the Court to exercise the utmost care whenever it is asked to break new ground in this field. *Id.*

In attempting to avoid this Court's holding in *Graham v. Connor,* 490 U.S. 386 (1989), Landowners cite *dicta* from *Soldal v. Cook County, Illinois,* 506 U.S. 56, 70 (1992). Pet. for Cert., p. 11. In *Soldal,* the plaintiffs' mobile home was removed and towed from a trailer park premises, under the observation of County Deputies, who were sued under § 1983. The Court of Appeals determined that, under *Graham v. Connor,* it should look at the "dominant character of the conduct challenged," and concluded that *Soldal's* claim was more akin to a challenge against the deprivation of property without due process of law than against an unreasonable seizure. . . ." *Id.* at 68. The Circuit Court concluded, therefore, that *Soldal* should not be allowed to bring his suit under the guise of the Fourth Amendment. In reversing, this Court held that the removal of the mobile home was a classic "seizure" implicating the Fourth Amendment. It cited *Graham* for the proposition that where several constitutional provisions target the same sort of governmental conduct, the Court will choose the more "explicit textual source of constitutional protection" over the "more generalized notion of 'substantive due process' ". 506 U.S. at 70. For that reason, this Court said: "Surely, *Graham* does not bar resort in this case to the

Fourth Amendment's specific protection . . . rather than the general protection of property in the Due Process Clause." *Id.*

In sum, the Petition for Certiorari cites no holding of this Court which is in conflict with the Ninth Circuit's application of *Armendariz* to this case.

3. ALTHOUGH SEVERAL CIRCUITS HAVE APPROACHED THE TAKINGS/SUBSTANTIVE DUE PROCESS ISSUE SOMEWHAT DIFFERENTLY FROM THE NINTH CIRCUIT, THERE IS NO DIRECT CONFLICT.

The Landowners argue that there is a significant "direct" conflict among the Circuits and that ". . . The Ninth Circuit stands alone," in its application of takings analysis to substantive due process claims. Pet. for Cert., pp. 11-15. First, the Ninth Circuit does not "stand alone" on this issue. Second, a careful reading of the cases cited reveals that, although there are some differences between the Ninth Circuit's approach and the approaches of several other Circuits, such differences are largely nuances in application in cases that are largely driven by their facts. *See, e.g., Miller v. Campbell County,* 945 F.2d 348, 353 n.6 (10th Cir. 1991) ("We need not address whether a taking might ever violate substantive or procedural due process without violating the Just Compensation Clause. We hold only that there is nothing in this record that would warrant a separate due process analysis over and above the consideration of the plaintiffs' more precise claims based on the Just Compensation Clause.").

The First Circuit, in *South County Sand & Gravel Co., Inc. v. Town of South Kingstown,* 160 F.3d 834 (1st Cir.

1998), considered an appeal of a challenge to a local ordinance regulating horizontal expansion of extractive industries. As a threshold question, the Court addressed whether the claim was properly classified as a substantive due process challenge or a takings claim. Referencing *Graham v. Connor, supra,* the Court stated:

> Because SCS's lament, at bottom, is a garden-variety regulatory takings claim, the Takings Clause, and not substantive due process, would seem to supply the proper decisional framework. (Citing *Villas of Lake Jackson, Ltd. v. Leon County,* 121 F.3d 610, 612-14 [11th Cir. 1997] and *Armendariz*).

Id. at 835. The Court, however, noted that in the context of that case, the differences were "largely a matter of semantics", *id.* at 836, and that there "is no need to submit to a tyranny of labels", concluding:

> Thus, although the substantive limits of the Takings Clause may not necessarily coincide with the substantive limits of the Due Process Clause in every imaginable context . . . the limits are congruent in this instance.

Id.

The primary differences between the Ninth Circuit's approach and that of other Circuits is found in the approach of the Fifth and Sixth Circuits. The Intervenors acknowledge that the Sixth Circuit, in *Pearson v. City of Grand Blanc,* 961 F.2d 1211, 1214 (6th Cir. 1992), did reject the rationale that all Federal zoning cases should be treated as "takings" on the basis that, "While it has the undoubted salutary advantage of minimizing the involvement of federal courts in local zoning[, it] cannot be

reconciled with current controlling precedent." The vitality of this holding is in doubt, however, based on the subsequent Sixth Circuit case *Montgomery v. Carter County, Tenn.*, 226 F.3d 758, 768-770 (6th Cir. 2000). *Montgomery* acknowledged, based on *Pearson*, that the Sixth Circuit's "precedents" permit (plaintiff) to assert "substantive due process . . . claims as well [as takings claims]." However, the Court went on to observe: "[I]t is not clear why the concept of substantive due process should have any place in takings cases." It then reviewed the analysis in *Armendariz* in a favorable way, but saw no need to resolve the issue, stating that:

> In any event, whatever the applicability of the concepts of procedural and substantive due process to takings claims, we agree that these concepts may not be used in order to mount an end run around the ripeness requirements of *Williamson County*.

The Landowners cite two Fifth Circuit cases, *Simi Inv. Co., Inc. v. Harris County, Texas*, 236 F.3d 240, 247 (5th Cir. 2000) and *John Corp. v. City of Houston*, 214 F.3d 573, 581 (5th Cir. 2000), for the proposition that, in the Fifth Circuit, the property owner's substantive due process claim is not subsumed by its Fifth Amendment takings claim. *Simi*, however, emphasized the limited nature of their holdings:

> Our limited holding in *John Corp.* is similarly limited here; we find only that when a state interferes with property interests, a substantive due process claim *may* survive a takings analysis and, therefore, provide jurisdiction for a federal court.

236 F.3d 249.

In *John,* the Court carefully reviewed the effect of *Graham* and noted that a number of Circuit Courts have used *Graham* "... to support considering a substantive due process claim as invoking the Takings Clause's protections (citing *South County Sand & Gravel Co., Inc. v. Town of South Kingstown,* 160 F.3d 834, 835 (1st Cir. 1998)) (applying *Graham* to facial due process challenge to ordinance); *Macri v. King County,* 126 F.3d 1125, 1129 (9th Cir. 1997) (holding that substantive due process claim alleging no legitimate public purpose was based on conduct that implicated the Takings Clause). 214 F.3d 582, 583. After examining these approaches, the *John* Court concluded that a "blanket rule" which applies *Graham* so that "the Takings Clause subsumes any substantive due process claim relating to a deprivation of property. . . ." is inconsistent with precedents in the Fifth Circuit and with the approach taken by a majority of other Circuits. 214 F.3d 583. "Instead, a careful analysis must be undertaken to assess the extent to which a plaintiff's substantive due process claim rests on protections that are also afforded by the Takings Clause, and, in the proper case, by the Fourth Amendment." *Id.* The Court then proceeded with a rather complicated and fact-driven analysis which, although different from the approach of the Ninth Circuit, is not in direct conflict.

Unlike *John,* the Landowners' theory in the present case falls squarely within the takings rubric because of the Landowners' allegation that they were deprived of the property right to exclude others. Thus, while there are differences between the Ninth Circuit and the Fifth Circuit in the application of *Graham v. Connor,* these differences are not material to the issues here presented by the Landowners.

The other Circuits cited by Landowners as "in conflict" – the Second, Third, Fourth and Eighth – are not.[3] In *Sameric Corp. v. City of Philadelphia,* 142 F.3d 582 (3rd Cir. 1998), there was no analysis of the Takings Clause at all – it was a straight substantive due process case. The Second Circuit's decision in *Kaluczky v. City of White Plains,* 57 F.3d 202 (2nd Cir. 1995) did not involve a land-use issue at all, or remotely implicate the Takings Clause. It involved a 1983 claim by a city personnel officer who alleged that the Mayor was of an adverse political party, and reduced his duties and harassed him in violation of the First and Fourteenth Amendments. In *Iowa Coal Min. Co. v. Monroe County, Iowa,* 257 F.3d 846, 853 (8th Cir. 2001), the Court simply addressed the substantive due process claim in connection with denial of a non-confirming use certificate, without addressing *Graham*.

Finally, Landowners cite two cases in which, they claim, the Courts held specifically that a person's property is protected by both the Due Process Clause and the Takings Clause, *Del-Rio Drilling Programs, Inc. v. United States,* 146 F.3d 1358 (Fed. Cir. 1998) and *Villas of Lake Jackson, Ltd. v. Leon County,* 121 F.3d 610 (11th Cir. 1997). Pet. for Cert., pp. 11-13. Although the Court in *Del-Rio* did determine that a party could seek just compensation for a "taking" or, in the alternative, seek to invalidate wrongful governmental conduct, *id.* at 1363, the Opinion does not use the term "substantive due process" at all in characterizing the potential claim.

---

[3] Landowners acknowledge that the Seventh and Tenth Circuits are not in direct conflict. *See* Pet. for Cert., p. 15, n.1.

The Eleventh Circuit, in *Villas of Lake Jackson,* is even less useful in establishing a direct conflict. That case involved a suit against the County rezoning property to prohibit high-density apartment complexes. The Court's main analysis is under a rubric that it refers to as a "due process takings" claim. 121 F.3d at 612-614. Citing *Dolan v. City Tigard,* 512 U.S. 374, 384 n.5, the Court said, "There is no separate cause of action under the Due Process Clause of the Constitution."[4]

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JAMES H. GOETZ
GOETZ, GALLIK, BALDWIN & DOLAN, P.C.
35 North Grand – 59715
P. O. Box 6580
Bozeman, MT 59771-6580
Telephone: (406) 587-0618
Attorneys for Respondents

Dated: April, 2003

[4] The Court did, however, briefly address a separate substantive due process argument, which it referred to as "arbitrary and capricious due process", finding that the undisputed evidence included a finding that the rezoning was arbitrary and capricious. *Id.* at 614-615.